

(22,472)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 201.

THE MICHIGAN TRUST COMPANY, PETITIONER,

vs.

EDWARD P. FERRY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE EIGHTH CIRCUIT.

INDEX.

	Original.	Print
Caption	a	1
Transcript from the circuit court of the United States for the district of Utah.....	1	1
Caption to transcript from United States circuit court.....	1	1
Amended complaint.....	1	1
Exhibit A—Decree of probate court for Ottawa county, Michigan, in the matter of the estate of Amanda W. Ferry, deceased.....	9	8
Demurrer to amended complaint.....	16	14
Order sustaining demurrer to amended complaint, etc.....	17	15
Motion to dismiss.....	17	16
Bill of exceptions.....	18	16
Motion for leave to amend amended complaint.....	18	16
Ruling on motion for leave to amend amended com- plaint and exception thereto.....	19	17
Ruling on demurrer to amended complaint and excep- tion thereto.....	19	17
Certificate of judge to bill of exceptions.....	19	17
Judgment, March 29, 1909.....	19	18
Petition for and order allowing writ of error.....	20	18
Assignment of errors.....	21	19

	Original.	Print
Supersedeas bond.....	22	20
Stipulation as to record to be returned upon writ of error..	23	20
Writ of error and clerk's return.....	24	21
Citation and admission of service.....	25	22
Clerk's certificate to transcript.....	26	23
Caption to supplemental transcript of proceedings in United States circuit court of appeals.....	28	24
Appearance of counsel for plaintiff in error.....	29	24
Appearance of Mr. Joseph T. Richards as counsel for defendant in error.....	29	25
Appearance of Messrs. Van Cott, Allison, and Riter as counsel for defendant in error.....	30	26
Order of submission.....	31	26
Opinion of United States circuit court of appeals.....	32	27
Judgment of United States circuit court of appeals.....	34	28
Petition of plaintiff in error for a rehearing.....	35	29
Certified copy of proof of publication of notice of hearing in probate court of petition for removal of executor, memorandum as to.....	41	32
Order denying petition for rehearing.....	41	32
Clerk's certificate to supplemental transcript.....	42	33
Stipulation as to return to writ of certiorari.....	43	34
Writ of certiorari.....	43	34
Return to writ of certiorari.....	46	35

(Certified.)

TRANSCRIPT OF RECORD.

United States Circuit Court of Appeals, Eighth Circuit.

No. 3108.

THE MICHIGAN TRUST COMPANY, a Corporation, Plaintiff in Error,
vs.
EDWARD P. FERRY, Defendant in Error.

In Error to the Circuit Court of the United States for the District
of Utah.

Filed June 28, 1909.

1 UNITED STATES OF AMERICA,
District of Utah, ss:

At a stated term of the Circuit Court of the United States for the District of Utah, begun and held in the building used as a United States court house, in the city of Salt Lake, in said district, on the second Monday, being the 13th day, of April, in the year of our Lord one thousand nine hundred and eight, and the one hundred and thirty-second of the Independence of the United States of America.

Present: Honorable John A. Marshall, United States District Judge for the District of Utah.

TRANSCRIPT OF THE RECORD.

No. 1024.

MICHIGAN TRUST COMPANY, a Corporation, Plaintiff,
vs.
EDWARD P. FERRY, Defendant.

Amended Complaint.

On the 14th day of December, 1908, plaintiff above named filed its amended complaint against said defendant, which, being entitled in said court and cause, is in words and figures following, to-wit:

Now comes the above named plaintiff, The Michigan Trust Company, and for its cause of action against the defendant Edward P. Ferry, alleges by way of amended complaint:

1. The said plaintiff, The Michigan Trust Company, is a cor-

poration organized and existing under the laws of the State of Michigan and a citizen of said State; and the said defendant, Edward P. Ferry, is a citizen of the State of Utah and an inhabitant of the said District of Utah.

2. That the Probate Court of Ottawa County in the State of Michigan is and at all times hereinafter mentioned was a court of record, having a seal, duly created and existing under and by virtue of the Constitution and laws of the State of Michigan and having general jurisdiction in probate matters.

3. That in the year 1870 one Amanda W. Ferry, a resident and citizen of the village of Grand Haven in the County of Ottawa, State of Michigan, died, leaving a last will and testament which was thereafter, and in the year 1871, duly admitted to probate in said Probate Court; and that under and by virtue of the provisions thereof and of the orders of said Probate Court duly made, the defendant Edward P. Ferry, a son of said decedent, was in said year duly appointed sole executor of said last will and testament, and thereupon duly qualified as such and entered upon his duties as such executor.

4. That thereafter and prior to the year 1901, the said Edward P. Ferry removed from the State of Michigan to the Territory, now State, of Utah, and for more than seven years last past has been a citizen and resident of the County of Salt Lake and State of Utah; that in the year 1901, said defendant had become and has ever since been mentally incompetent, and on or about the 13th day of February, 1901, was, by the District Court of the Third Judicial District of the State of Utah, under proceedings duly had and taken, adjudged and declared to be an incompetent person, and W. Mont Ferry and Edward S. Ferry, residents of Salt Lake City, Utah, sons of said defendant, were duly and regularly appointed Guardians of the person and estate of said incompetent, and they immediately qualified and entered upon the discharge of their duties as such Guardians, and ever since said date have been and now are the general guardians under such appointment of the person and estate of said defendant.

5. That on or about the 20th day of June, 1903, William Montague Ferry, Amanda Harwood Hall, Hannah Elizabeth Jones, Elizabeth Eastman, Edward F. Eastman, Thomas White Eastman, George Mason Eastman, Hettie Eastman, Hannah Elizabeth Wulzen, Mary White Eastman and Mary Amanda Fairchild, the said William Montague Ferry being a residuary legatee and devisee under the said last will and testament of said Amanda W. Ferry, deceased, and all persons hereinabove in this paragraph 5 named being heirs at law and distributees of Thomas White Ferry, deceased intestate, who was also a residuary legatee and devisee under said last will and testament of said Amanda W. Ferry, deceased, filed in the said Probate Court for the County of Ottawa, State of Michigan, their petition, praying for the removal of said Edward P. Ferry, defendant herein, as executor of the last will and testament of his mother, Amanda W. Ferry, deceased, that he or his representatives be ordered to account forthwith to said Court for

the residue of said estate of said deceased which was unadministered, for the appointment of The Michigan Trust Company, plaintiff herein, or some other suitable person as administrator de bonis non with the will annexed of said estate, and that said Probate Court make such other and further order in the premises as to it might seem proper.

6. That thereupon the said Probate Court of Ottawa County, Michigan, made and entered an order fixing July 21, 1903, as the day for the hearing of said petition, and causing notice of said petition and of the time and place of the hearing thereof to be published in a newspaper directed in said order, and said order was thereupon duly published in said newspaper, being a newspaper printed, published and circulated in the said County of Ottawa, State of Michigan, and said publication was made in all respects in the manner and for the period required by the statutes of the State of Michigan and the requirements of said order; that on June 30, 1903, a copy of the order of said Probate Court so as aforesaid fixing July 21, 1903, as the day for the hearing of the said petition was duly served on said defendant Edward P. Ferry, and upon his said guardians, W. Mont Ferry and Edward S. Ferry, in the City of Salt Lake and State of Utah.

7. That thereupon said W. Mont Ferry and Edward S. Ferry as guardians as aforesaid of the defendant Edward P. Ferry, employed and retained on behalf of said Edward P. Ferry, as his counsel in said matter and proceedings and for the hearing on said petition, the law firm of Smith, Nims, Hoyt and Erwin, attorneys at law of the City of Muskegon, Michigan; that thereafter and to-wit, on July 21, 1903, the day fixed for the hearing of said petition, there appeared before the said Probate Court for Ottawa County, State of Michigan, at the Court House in the City of Grand Haven, one John Vanderwerp, an attorney and counsellor at law of said Court, then a member of, associated with or employed by said law firm so employed and retained, and David D. Erwin, one of the members of said law firm so employed and retained, both of the City of Muskegon, State of Michigan; and thereupon, the said petition having been brought on for hearing, the said Edward S. Ferry appeared in open Court in person, and the family of Edward P. Ferry, defendant herein, appeared by said John Vanderwerp; and the said John Vanderwerp, then and there employed for that purpose by the guardians of said defendant under the order and permission of the said District Court of the Third Judicial District of Utah, represented to said Probate Court that it would be necessary to file on behalf of said Edward P. Ferry, defendant herein, an answer to said petition and to claim in such answer affirmative relief, and said John Vanderwerp then and there requested on behalf of said family of said Edward P. Ferry, defendant herein, that said David D. Erwin be appointed guardian ad litem and next friend for said Edward P. Ferry, defendant herein; and thereupon by the order of said Probate Court, the said David D. Erwin, employed and retained as aforesaid, was appointed guardian ad litem and next friend for said Edward P. Ferry, de-

fendant herein, to represent him in the matter of said petition, as well as to prosecute any proceedings that he might be advised necessary to be taken on behalf of said Edward P. Ferry, defendant herein, to obtain affirmative relief in matters relating to said estate of Amanda W. Ferry, deceased. That on the same day the said executor, Edward P. Ferry, defendant herein, by the said David D. Erwin, his guardian ad litem and next friend, by the procurement and under the employment of the said guardians as aforesaid and authorized and permitted so to do by the Court of their appointment, filed his answer to the said petition, and filed also in said matter at the same time a cross-petition, praying for affirmative relief, the same being duly filed in open court in the presence of said Edward S. Ferry, son and guardian of said defendant, Edward P. Ferry. That said answer and cross-petition had been prepared by said Smith, Nims, Hoyt and Erwin under their employment and retainer by said guardians on behalf of said Edward P. Ferry, defendant herein, prior to the appointment of said David D. Erwin as guardian ad litem as aforesaid, and immediately upon such appointment said answer and cross-petition was subscribed by Edward P. Ferry, defendant herein, by his said guardian ad litem and next friend, and by Smith, Nims, Hoyt and Erwin, as attorneys, said attorneys having been employed and authorized for that purpose by the said general guardians, who were directed and permitted so to employ said attorneys by the said Court of their appointment. That the affirmative relief prayed for in said cross-petition was that the said Probate Court by order declare and determine that the said estate of Amanda W. Ferry had been fully administered and closed, that said executor be discharged and his bond as such be cancelled, and that said executor have such other and further relief as to the Court might seem meet.

That thereafter the answer of the original petitioners to said cross-petition was filed, and issue was thereby joined and the accounting suit was set for hearing before said Probate Court and subsequently came on for trial. That during the progress of said accounting suit the said Edward P. Ferry, defendant herein, appeared therein and was represented by said law firm of Smith, Nims, Hoyt and Erwin, afterwards Nims, Hoyt, Erwin, Sessions & Vanderwerp, afterwards Nims, Hoyt, Erwin & Vanderwerp, as also by Willard Kingsley, Esq., and Arthur C. Denison, Esq., attorneys at law of Grand Rapids, Michigan, George A. Farr, Esq., attorney at
5 law of Grand Haven, Michigan, and Joseph T. Richards, Esq., and William H. Dickson, Esq., attorneys at law of Salt Lake City, Utah, all of whom were retained and employed on behalf of said Edward P. Ferry, defendant herein, by his said guardians, W. Mont Ferry and Edward S. Ferry and paid by said guardians out of the funds and estate of said Edward P. Ferry, defendant herein, under the order, direction and approval of said District Court for the Third Judicial District for the County of Salt Lake and State of Utah, whereby said guardians were authorized to defend said litigation in the Probate Court of Ottawa County and State of Michigan aforesaid against said Edward P. Ferry, defendant

herein, and all other litigation which might be instituted against him, and to pay all necessary expenses connected therewith. That on August 29, 1907, said Arthur C. Denison, Esq., was by order of said Probate Court of Ottawa County, Michigan, substituted as attorney of record for such guardian ad litem and next friend in the place and stead of said Nims, Hoyt, Erwin & Vanderwerp, and at the same time David D. Erwin resigned his trust as guardian ad litem and next friend of the said Edward P. Ferry. Such resignation was presented to the Probate Court for Ottawa County, Michigan, and accepted by order of said Court on August 29, 1907. On the same day said Denison, under employment of said guardians, presented, on behalf of W. Mont Ferry and Edward S. Ferry, acting as the sons of said defendant Edward P. Ferry and in their father's interest, to said Probate Court by petition the name of one Frederick W. Stevens as guardian ad litem and next friend in the place and stead of said David D. Erwin and requested his appointment as such. Said request for the appointment of said Stevens as such guardian ad litem and next friend was accompanied by and based upon the written request of said W. Mont Ferry and Edward S. Ferry, in which they requested that said Judge of Probate should fill said vacancy caused by the intended resignation of said Erwin by the appointment of said Stevens; or if for any reason said Stevens should not be available, then by the appointment of some other person to be selected by said Denison. On the same day, pursuant to such written request, said Frederick W. Stevens was appointed by the order of said Court guardian ad litem and next friend of the said defendant Edward P. Ferry, and he thereupon accepted said appointment, which still remains in full force and effect. That from the time when said defendant Edward P. Ferry, by his son and his counsel, appeared as aforesaid in said Probate Court of Ottawa County, Michigan, in said matter of the petition filed by said petitioners in the estate of Amanda W. Ferry, deceased, on July 21,

1903, and procured the appointment of said Erwin as guardian ad litem and next friend of said defendant Edward P.

Ferry, down to the present time, the litigation concerning the issues raised by the said petition, answer and cross-petition and the answer thereto, and in the matter of the said accounting, and numerous applications to other courts of Michigan for mandamus and other relief in respect of said proceeding pending in said Probate Court, has been conducted for and on behalf of said Edward P. Ferry, defendant herein, under the direction and control of said W. Mont Ferry and Edward S. Ferry, sons and guardians of said defendant Edward P. Ferry, and under the direction and control and subject to the orders of the District Court of the Third Judicial District of the State of Utah for the County of Salt Lake, and all the costs, fees and expenses incurred by the said sons and guardians in the conduct of said suit in the said Probate Court for Ottawa County, Michigan, have from time to time been paid by the said guardians of said defendant, and most if not all of said payments and expenditures have been reported to and authorized and allowed by said District Court of the Third Judicial District of Utah for

the County of Salt Lake as payments out of the estate of said defendant Edward P. Ferry then and there in the course of administration. That at all times since 1901, the said defendant has been a resident of the State of Utah and has not at any time since 1901 been personally present within the State of Michigan.

8. That on or about said 26th day of June, 1903, this plaintiff was, on application of said petitioners and in full compliance with the laws of said State of Michigan in such case made and provided, duly appointed by said Probate Court of Ottawa County, Michigan, as special administrator of said estate of Amanda W. Ferry, deceased, and thereupon accepted said appointment and qualified as such, and took possession of the assets of said estate in Michigan and ever since has been down to the 2nd day of January, 1908, the duly appointed, qualified and acting special administrator of said estate.

That during the course of said litigation in the Probate Court of Ottawa County, Michigan, and to-wit, in or about the year 1905, the petitioner William Montague Ferry departed this life, and this plaintiff was duly appointed by said Probate Court administrator with the will annexed for the State of Michigan of the estate of said William Montague Ferry, deceased, and thereupon accepted said appointment and qualified as such, and ever since has been and now is the duly appointed, qualified and acting administrator with the will annexed for the State of Michigan of the estate of said William

Montague Ferry, deceased, and as such was by order of said
7 Probate Court of Ottawa County, Michigan, duly substituted for said William Montague Ferry as petitioner in said litigation, and was such party petitioner at the time of the rendition of the decree therein hereinafter set forth;

That during the course of said litigation in the Probate Court of Ottawa County, Michigan, to-wit, in or before the year 1905, by order of said Court this plaintiff was duly appointed as and thereupon qualified and ever since has been and now is the duly appointed, qualified and acting administrator for the State of Michigan of the estate of Mary L. F. Eastman, deceased, intestate and heir at law and distributee of Thomas White Ferry, who was one of the residuary legatees and devisees of said Amanda W. Ferry, deceased as aforesaid, and as such administrator was by order of said Probate Court of Ottawa County, Michigan, duly made a party petitioner in said litigation, and was such party petitioner at the time of the rendition of the decree therein hereinafter set forth.

9. That during the course of said litigation in the said Probate Court of Ottawa County, Michigan, proofs were offered by said petitioners and by said Edward P. Ferry, respectively, and were taken upon the issues joined, to-wit, the issue raised by the petition of said petitioners and the answer of the said defendant Edward P. Ferry thereo, and the issues raised by the cross-petition of the said Edward P. Ferry and the answer of the said petitioners thereto; and thereafter such proceedings were had that the matter was submitted to said Probate Court for decision, and after full consideration, on, to-wit the 31st day of December 1907 at a session of said Probate

Court duly held at the City of Grand Haven, Ottawa County, Michigan, a decree or judgment was by said Probate Court duly made, rendered, entered and docketed in favor of this plaintiff and said other petitioners and against the said defendant Edward P. Ferry, by which judgment or decree it was ordered, adjudged and decreed that the cross-petition of said defendant be denied, that said defendant Edward P. Ferry, as executor of the last will and testament of Amanda W. Ferry, deceased, be removed forthwith from his office as such executor; that The Michigan Trust Company one of the petitioners therein and plaintiff herein, be and is appointed as administrator de bonis non with the will annexed of said Amanda W. Ferry, deceased, said appointment to take effect on the filing in said Probate Court by said The Michigan Trust Company of its acceptance of said trust; that said Edward P. Ferry, defendant herein, is individually liable for an indebtedness of Sixteen Thousand Four Hundred Fifty-eight and 81/100 Dollars (\$16,458.81) to the estate of Amanda W. Ferry, deceased, and that said Edward P. Ferry do pay within sixty days from the date of rendition of said judgment or decree to The Michigan Trust Company, plaintiff herein, the sum of Sixteen Thousand Four Hundred Fifty-eight and 81/100 Dollars (\$16,458.81), together with interest on said sum from December 31, 1907, until paid at the rate of five per cent (5%) per annum. A true copy of said decree is hereto attached marked "Exhibit A" and made a part of this complaint.

That thereafter, on to-wit, January 2, 1908, this plaintiff duly filed in said Probate Court its acceptance of said trust, and ever since said last named date has acted and has been and now is recognized by said Probate Court as the administrator de bonis non with the will annexed of said Amanda W. Ferry, deceased.

10. That under the law at all times in force in said State of Michigan, the said Edward P. Ferry, defendant herein, by accepting the office of executor under appointment by said Probate Court, and qualifying thereunder, and by his oath of office and bond as such executor, subjected himself to and ever since, down to the time of his removal by said Probate Court of Ottawa County, Michigan, on December 31, 1907, has been subject to the direction and jurisdiction of said Probate Court in respect of said estate of Amanda W. Ferry, deceased, and amenable to all orders, judgments and decrees of said Probate Court touching upon the discharge of the duties of his said office of executor.

11. That all of said proceedings in said Probate Court of Ottawa County, Michigan, were duly had in full compliance with the law then in force in said State of Michigan.

12. That said judgment or decree under the law then and now in force in said State of Michigan is a final judgment or decree against the defendant Edward P. Ferry, and has been treated as such by all parties to said litigation in Michigan, including the said Edward P. Ferry, defendant herein, as appearing therein by his guardian ad litem and next friend and his counsel therein aforesaid, as also by the said Probate Court, the Circuit Court of Michigan for

the County of Ottawa and the Supreme Court of Michigan, and remains in full force and effect and has not been appealed from; that the said [defendant] is wholly unsatisfied, and by reason of the premises the defendant Edward P. Ferry became and is indebted to the plaintiff in the sum of Sixteen Thousand Four Hundred Fifty-eight and 81/100 Dollars (\$16,458.81), with interest from December 31, 1907, at the rate of five per cent (5%) per annum.

9 Wherefore plaintiff prays judgment against the said defendant in the sum of Sixteen Thousand Four Hundred Fifty-eight and 81/100 Dollars, with interest from December 31, 1907, at the rate of five per cent (5%) per annum, and costs of this action.

HENDERSON, PIERCE, CRITCHLOW &
BARRETTE, *Attorneys for Plaintiff.*

STATE OF UTAH.

County of Salt Lake, ss:

E. B. Critchlow, being first duly sworn, deposes and says: That he is one of the counsel for the plaintiff, The Michigan Trust Company, herein, and makes this verification on behalf of said plaintiff for the reason that plaintiff is absent from the State of Utah and has no officer or agent other than affiant within the State of Utah; that affiant has read the foregoing Amended Complaint and knows its contents and that the same is true.

E. B. CRITCHLOW.

Subscribed and sworn to before me this 12th day of December 1908.

JAMES H. BALL,
Notary Public.

My Commission Expires May 27, 1912.

Rec'd copy hereof this 14th day of Dec. 1908.

RICHARDS, RICHARDS & FERRY.
VAN COTT, ALLISON & RITER.

EXHIBIT "A".

STATE OF MICHIGAN:

In the Probate Court for the County of Ottawa.

At a Session of said Court Held at the Court-House, in the City of Grand Haven, in said County, on the 31st Day of December, A. D. 1907.

Present, Honorable Edward P. Kirby, Judge of Probate.

In the Matter of the Estate of WILLIAM M. FERRY, Deceased.

This matter came on to be heard on the petition filed herein for the removal of Edward P. Ferry, Executor of the last will and testament of Amanda W. Ferry, deceased, and for an accounting by said Executor, in which petition the following persons are petitioners, viz. The Michigan Trust Company, Administrator with the will annexed for the State of Michigan of the Estate of 10 William Montague Ferry, deceased, Amanda Harwood Hall, Hannah Elizabeth Jones, Mary Amanda Fairchild, Edward F. Eastman, Elizabeth Eastman, Thomas White Eastman, Hettie Eastman, Hannah Elizabeth Wulzen, Mary White Eastman, George Mason Eastman and The Michigan Trust Company, Administrator for the State of Michigan of the Estate of Mary L. F. Eastman, deceased, and also on the answer and cross-petition of Edward P. Ferry, a mentally incompetent person appearing by his guardian ad litem and next friend Fred W. Stevens, and also on the answer of said petitioners to said cross-petition.

Proofs were taken in behalf of the respective parties, and after argument had, an interlocutory order was made by this Court directing that the said Executor Edward P. Ferry, appearing by his guardian ad litem and next friend Fred W. Stevens, do file in this Court a more detailed statement of account of the receipts and disbursements of said Executor on account of said estate since the filing of the second annual account of the Executor, including the disposition (if any has been made) of the properties on hand at that date and the other properties (if any there be) belonging to said estate;—such statement of account to give the dates and items of such receipts and disbursements so far as reasonably practicable.

Thereupon said Executor contended before this Court that the powers of attorney, written authorizations, mortgages, deeds and other conveyances, alleged to have been made in pursuance of such powers of attorney and authorization, constitute and are a full, complete and final account of said Executor in this Court, as the representative of said estate, and that said Executor should not be required to render any other or further account in this Court; and the said Executor neglected and refused to render any other or further account than as herein specified, insisting upon the approval

of his said alleged final account; and that this Court made an order declaring that the estate of said deceased has been fully administered and closed and discharging said Edward P. Ferry as Executor, and cancelling the said Executor's bond, and releasing and discharging the sureties thereon.

Thereafter, pursuant to leave of the Court, further proofs were taken in said cause, and after the same were concluded, and as preliminary to a final order hereon on the merits, by like leave of the Court, the petitioners for accounting made and submitted to the Court a statement charging, surcharging and falsifying the alleged final account of Edward P. Ferry as Executor of the last will and testament of said deceased, already before the Court; which statement presented the proper amendments and objections
11 of petitioners to the said alleged final account of said executor with the said estate and stated said account as petitioners claim the same to be. After the submission of said statement the accountant for petitioners was cross-examined, and thereupon the proofs in said cause were concluded and the cause was submitted to the Court for its consideration and decision, and has been held under advisement by this Court until the present time, the earlier decision of the cause having been restrained by certain proceedings in mandamus in the Circuit Court.

It is also made to appear to the satisfaction of the Court, by affidavit on file, that the order of the Court touching the examination of the final account of said Executor made on the 6th day of March, 1907, has been duly published as therein directed, giving all persons interested in said estate notice of the same, and that personal notice has also been given to all persons interested of the examination of said final account of said Executor, and the alleged final account of said Executor and all the other statements and accounts hereinbefore referred to have been carefully examined and corrected by the Court.

And, after due deliberation, the Court finds the following facts in this case.

I.

Said Amanda W. Ferry died on December 30th, 1870, leaving a last will and testament, which was duly admitted to probate in this Court, and letters testamentary were issued by this Court to [his] son, Edward P. Ferry, the Executor therein named, on March 6, 1871.

II.

Said Amanda W. Ferry at [his] death was a resident and inhabitant of Ottawa County, and left an estate in said County, to be administered, the same consisting of real and personal property.

III.

Said Edward P. Ferry qualified as such Executor and entered upon the duties of his trust, but has never filed any annual or other account of his administration in this Court, except such account

as [in] contained in the answer and cross-petition of said Executor, appearing by his guardian ad litem and next friend in this accounting suit, and in the powers of attorney, written authorizations and mortgages, deeds and other conveyances alleged to have been made in pursuance of such powers of attorney and authorizations. 12 all of which papers are claimed by said Executor to be and constitute a full, complete and final account of said Edward P. Ferry in this Court, as the representative of said estate, and he has asked this Court to accept them as such and thereupon to discharge him as such Executor.

IV.

The Court finds that the accounts specified in the preceding paragraph are not true or correct; that said Executor has not accounted for all the moneys or properties of said estate coming to his hands; that he is not entitled to be discharged from his trust; that at the time of the issuance of letters testamentary to said Executor, there came to his possession a large amount of property belonging to said estate, and since that date large amounts, both of money and property, belonging to said estate, have come to the hands of said Executor from time to time, none of which have been accounted for by said Executor to this Court; that various large sums of money belonging to said estate, as well also as many and valuable properties belonging thereto, have come to the hands of said Edward P. Ferry and have been misappropriated by him and converted to his individual use instead of being applied to or for the benefit of said estate.

V.

In or about the year 1878 Edward P. Ferry removed from the State of Michigan and established his residence in the Territory, now State of Utah, and he has ever since been and now is a resident of Utah, and is now domiciled at Salt Lake City, and is, and since in or about 1878 has been, a nonresident of Michigan.

VI.

On or about February 10th, 1892, the said Edward P. Ferry was, and ever since has been, and now is, a mentally incompetent person; and the Court finds that because of his mental incompetence, and also because of the misappropriation and conversion by him to his own uses of the assets of said estate, and the mismanagement of the affairs of the estate, he is wholly unsuitable and incapable to discharge the duties and office of Executor of said will.

VII.

All the debts, expenses of administration, and the specific and money legacies in said will of said deceased, have been fully paid and satisfied, but the residuary legatees and devisees have not been paid or satisfied, and all persons interested in the residue of said estate are now before this Court.

VIII.

Under the will of said deceased, said Edward P. Ferry was himself entitled to the one-third part of the residue of said estate, and the petitioners for accounting hereinbefore named are the persons entitled to the remaining two-thirds part of said residue, save that said Thomas W. Ferry, now deceased, was entitled to the one-third part of the residue of said estate. Said Thomas W. Ferry died in the year 1898 at Grand Haven, being at the time of his death a resident and inhabitant of Ottawa County, and leaving estate therein to be administered, and R. Andrew Fleming is the Administrator de bonis of his estate. Said R. Andrew Fleming, as such Administrator de bonis non, has been duly cited to appear in this accounting suit; and the persons beneficially interested in the estate of said Thomas W. Ferry as distributees thereof, are the petitioners for accounting hereinbefore named and said Edward P. Ferry, all of whom are now before this Court in this cause.

IX.

The Court finds that the estate of Amanda W. Ferry, has not been fully administered: that said Executor is not entitled to an order closing the same: that it was and is the duty of said Edward P. Ferry to render a true and perfect account of his doings as Executor, but that he has neglected and refused to do so: that those acting in behalf of said Executor have taken from Michigan to Utah books and papers of said Edward P. Ferry containing certain of his accounts as Executor of the last will and testament of his said mother, and have refused to return the same when ordered by this Court to do so, in a certain litigation therein pending in the matter of the estate of William M. Ferry, deceased, and have refused to make and render an account of said executor with said estate of Amanda W. Ferry, deceased, except as hereinbefore specified, and so far as lies in their power have suppressed evidence in said cause and have endeavored to prevent the decision of said cause on the merits: that it has therefore, become necessary for this Court to state said accounts from the proofs in this cause: that the proofs afford such data as to enable the Court to state the same truly and correctly and in such manner as to do no injustice to said Executor: that in stating said account it is not possible for the Court to determine the profits on investments made by the Executor of the funds of said estate, and for this reason it is the view of the Court that it will best accord with substantial justice to award, in lieu of profits, simple interest at the legal rate on sums misappropriated by said Executor or converted by him to his own use, first deducting therefrom credits to which the Executor is entitled, such

14 interest to be computed from the end of each year in such manner as not to compound the same. And the Court finds and determines that, upon the balance owing to the estate by said Edward P. Ferry, Executor, at the end of each year, interest is to be computed at the legal rate, but not in such manner as to compound the same; such legal rate to be as follows: 7% from December

30th 1870, to September 27th, 1887; 6% from September 27th 1887 to September 22nd, 1899; 5% from September 22nd, 1899, to the date of the decree. The Court directs that interest be computed accordingly.

X.

The Court files herewith a memorandum or statement showing more particularly the manner in which the account of said Edward P. Ferry, Executor as aforesaid, is stated by the Court, and interest is computed, and finds and determines such statement so prepared by the Court to be correct, just and true, and the same is hereby allowed and approved, as set out in said statement or memorandum so filed, and as more particularly stated hereinafter.

XI.

From the proofs in the cause, the Court finds and determines that, after crediting all disbursements, said Edward P. Ferry, Executor as aforesaid, is indebted to the estate of Amanda W. Ferry, deceased, at this date, upon balance of account, in the full and true sum of Twenty-four Thousand Six Hundred and Eighty-eight and 21/100 Dollars (\$24,688.21), and that said sum of money is now justly due and owing by said Edward P. Ferry to said estate, over and above all legal set-offs or counter-claims.

XII.

It is Therefore Ordered, Adjudged and Decreed that the prayer of the cross-petition of said Executor Edward P. Ferry, appearing herein by Fred W. Stevens, his guardian ad litem and next friend, wherein it is asked that an order be made by this Court determining and declaring that the estate of Amanda W. Ferry, deceased, has been fully administered and closed, and discharging the said Edward P. Ferry as Executor, cancelling said Executor's bond, and releasing and discharging the sureties therein, be and the same is hereby denied.

XIII.

It is Further Ordered, Adjudged and Decreed that said Edward P. Ferry be and he is hereby removed forthwith from his

15 office as Executor of the last will and testament of Amanda W. Ferry, deceased. The grounds of such removal are the following:

- (a) The mental incompetence of said Executor;
- (b) His residence out of this State;
- (c) His neglect, after due notice given by the Judge of Probate, to render his account and settle the estate according to law.
- (d) His neglect to perform various decrees of this Court;
- (e) His misappropriation and conversion to his individual use of the assets of said estate, and becoming otherwise unsuitable to perform his trust;

All of which grounds above stated the Court finds to be true.

XIV.

It is Further Ordered, Adjudged and Decreed that The Michigan Trust Company, a corporation of Grand Rapids, Michigan, be, and it is hereby appointed Administrator de bonis non with the will annexed of the estate of said Amanda W. Ferry, deceased,—such appointment to take effect forthwith upon the filing in this Court by the Michigan Trust Company of its acceptance of said trust.

XV.

Inasmuch as it appears from the proofs that said Edward P. Ferry has been guilty of waste and mismanagement in the affairs of said estate, and has misappropriated and converted to his own use the assets of the estate in a large sum, and has thereby entailed great loss and expense upon the persons interested in said estate. It is Further Ordered, Adjudged and Decreed that no commission, executor's fees or compensation be awarded to him for his services.

XVI.

It is made to appear to this Court that the said Edward P. Ferry is himself a residuary legatee under his mother's will, and as such is entitled to a one-third interest in the residue of said estate, and that it might impose a hardship upon him if he were compelled to pay over to the Administrator de bonis non with the will annexed of said one-third share of the net balance, fixed and determined in paragraph XI of this decree. Said Edward P. Ferry will be excluded from participating in the distribution of the remaining two-thirds part of the moneys owing under the terms of this decree, except in so far as he may show himself to be entitled on final distribution to participate therein as a distributee of Thomas W. Ferry's estate.

16

XVII.

The remainder of the indebtedness owing by said Edward P. Ferry, said Executor, to the estate of said Amanda W. Ferry, deceased is the sum of Sixteen Thousand Four Hundred and Fifty-eight and 81/100 Dollars (\$16,458.81), and it is further Ordered, Adjudged and Decreed that said Edward P. Ferry is individually liable therefor to the estate of Amanda W. Ferry, deceased, and that within sixty days from this date, said Edward P. Ferry, said Executor, do pay the said sum of Sixteen Thousand Four Hundred and Fifty-eight and 81/100 Dollars (\$16,458.81), to the Michigan Trust Company, Administrator de bonis non with the will annexed of the estate of said Amanda W. Ferry, deceased, together with the interest on said sum from this date until paid at the rate of five (5) per cent per annum.

XVIII.

Upon the making of the payment specified in the preceding paragraph of this decree and filing due proof thereof in this Court,

said Edward P. Ferry shall be discharged from all further obligation as Executor of his mother's estate, and his bond shall be cancelled.

EDWARD P. KIRBY,
Judge of Probate.

1124. Amended Complaint. Filed Dec. 14, 1908. Jerrold R. Letcher, Clerk.

Demurrer to Amended Complaint.

And afterwards and on the 22nd day of December, 1908, defendant filed demurrer to amended complaint, which, being entitled in said court and cause, is in words and figures following, to-wit:

Comes now the defendant Edward P. Ferry, an incompetent person, appearing by William Montague Ferry and Edward Stewart Ferry, his general guardians, and demurs to the plaintiff's amended complaint, and for cause of demurrer alleges:

That the said amended complaint does not state facts sufficient to constitute a cause of action.

RICHARDS, RICHARDS & FERRY,
Attorneys for Defendant.

VAN COTT, ALLISON & RITER,
Of Counsel.

I, Joseph T. Richards, one of the attorneys for the defendant in the above entitled action, do hereby certify that, in my
17 opinion the foregoing demurrer is well founded in point of law, and it is not interposed for delay.

Dated December 22, 1908.

JOSEPH T. RICHARDS.

Received copy December 22nd, 1908.

HENDERSON, PIERCE, CRITCHLOW
& BARRETTE,
Attorneys for Plaintiff.

Filed Dec. 22, 1908. Jerrold R. Letcher, Clerk.

Order in re Demurrer to Complaint & Motion to File Amendment.

And afterwards and on the 6th day of March, 1909, an order was made in re demurrer to amended complaint and also in re motion to file amendment, which, being entitled in said court and cause, is in words and figures following, to-wit:

This cause having been heretofore submitted on defendant's demurrer to the amended complaint herein, and also upon plaintiff's

motion for leave to file an amendment to the 12th paragraph of the amended complaint herein, and by the Court taken under advisement. Now, after due consideration, it is Ordered by the Court that said demurrer be sustained, and that plaintiff's motion to file amendment be denied.

J. A. MARSHALL, Judge.

Motion to Dismiss.

And afterwards and on the 9th day of March, 1909, defendant filed motion to dismiss this cause, which, being entitled in said court and cause, is in words and figures following, to-wit:

To the plaintiff and Messrs. Henderson, Pierce, Critchlow and Barrette, its attorneys:

The Court having sustained the defendant's demurrer and denied the application of the plaintiff for leave to amend in the above entitled action, now comes the defendant and moves the Court to dismiss the said cause at plaintiff's cost.

RICHARDS, RICHARDS & FERRY,

Attorneys for Defendant.

18 VANN COTT, ALLISON & RITER,

Of Counsel.

Dated March 9, 1909.

I, Joseph T. Richards, one of the attorneys for the defendant in the above entitled action, certify that, in my opinion, the foregoing motion is well founded in point of law and is not interposed for delay.

JOSEPH T. RICHARDS.

Copy received Mch. 9, 1909. H. P. Critchlow & B. attys. for Plff. Filed March 9, 1909. Jerrold R. Letcher, Clerk, By Margaret B. Connell, Deputy.

Bill of Exceptions.

And afterwards and on the 15th day of March, 1909, plaintiff filed its bill of exceptions to the ruling of the Court, which, being entitled in said Court and Cause, is in words and figures following, to-wit:

Know All Men By These Presents: That on the 1st day of February, 1909, in open Court, counsel for defendant being present, counsel for the plaintiff, by leave of Court, moved to be permitted to further amend the amended complaint of plaintiff herein in the following particular, to-wit:

By inserting in the 12th paragraph of said amended complaint after the words, "and has not been appealed from" the following:

"That on to-wit the 10th day of February, 1908, the said defend-

ant Edward P. Ferry, by Frederick W. Stevens, his guardian ad litem and next friend, appearing by said Denison as his attorney, filed in said Probate Court a notice of appeal to the Circuit Court of Ottawa County from said decree Exhibit "A," together with the reasons therefor incorporated in said notice, as required by law, and at the same time tendered to the said Probate Judge for his approval a bond on said appeal executed by said defendant, and ever since said last named date has by said guardian ad litem and next friend and the said attorney been seeking by various proceedings in the Circuit Court of Ottawa County and in the Supreme Court of Michigan to compel the said Probate Court of Ottawa County to accept and approve said bond and allow said appeal: and in the course of the proceedings so taken as aforesaid, to-wit in a petition to the said Circuit Court for Ottawa County for a Writ of Mandamus, said defendant by his said guardian ad litem and next friend, averred and showed to the Court that the said Probate Court on December 31, 1907, rendered a final decree in said estate of Amanda W. Ferry, deceased, to-wit, the decree Exhibit "A" hereunto attached."

Whereupon the Court, after considering the same together with the allegations of said amended complaint, denied said motion and refused to permit the said amendment upon the ground and for the reason only that said amendment so offered by plaintiff contained allegations of matters all of which were immaterial and irrelevant to the cause of action set forth in said amended complaint.

And to the said order and ruling so made plaintiff duly excepted and said exception was allowed by the Court.

And thereafter on the 6th day of March, 1909, the Court having considered the demurrer interposed herein by the defendant to the amended complaint of plaintiff, which demurrer was taken upon the ground and for the reason that the said amended complaint does not state facts sufficient to constitute a cause of action, made and entered herein its order sustaining said demurrer, to which ruling plaintiff by its counsel duly excepted and said exception was allowed.

And because the foregoing are matters proper to be incorporated in a Bill of Exceptions, now upon motion of counsel for plaintiff and upon notice to counsel for defendant the above and foregoing is hereby signed and sealed as and for plaintiff's Bill of Exceptions herein.

Dated March 15th, 1909.

J. A. MARSHALL, *Judge.*

Filed March 15-1909. Jerrold R. Letcher, Clerk.

Judgment.

And afterwards and on the 29th day of March, 1909, judgment of dismissal was entered herein, which, being entitled in said court and cause, is in words and figures following, to-wit:

At this day comes E. S. Ferry, attorney for said defendant, and on his motion, it is Ordered that this cause be and it is hereby dismissed at plaintiff's costs.

Wherefore, by virtue of the law and by reason of the premises aforesaid, it is Considered, Ordered and Adjudged that said plaintiff take nothing by its complaint herein and that said defendant go hence hereof without day; and it is further Ordered that said defendant, Edward P. Ferry, do have and recover of and from
20 said plaintiff, Michigan Trust Company, a corporation, his costs herein incurred and taxed at the sum of \$20; and let execution issue therefor.

Petition for Writ of Error.

And afterwards and on the 22nd day of May, 1909, plaintiff filed its petition for writ of error, which, being entitled in said Court and Cause, is in words and figures following, to-wit:

Comes w the above named plaintiff, the Michigan Trust Company, by us Attorneys, and complains that in the record and proceedings had in said cause, and also in the rendition of the judgment in the above entitled cause, in said United States Circuit Court for the District of Utah, in favor of said defendant and against said plaintiff, on the 29th day of March, 1909, manifest error hath happened, to the great damage of said plaintiff—

Wherefore, said plaintiff prays for the allowance of a Writ of Error and for an Order allowing said plaintiff to prosecute a Writ of Error to the United States Circuit Court of Appeals for the Eighth Circuit, and also for an Order fixing the amount of bond for a supersedeas and for costs in said cause, and for such other orders and process as may cause the same to be corrected by the said United States Circuit Court of Appeals for the Eighth Judicial District.

Dated this 22 day of May, A. D. 1909.

H. C. HALL,
E. B. CRITCHLOW,
Attorneys for Plaintiff.

HENDERSON, PIERCE, CRITCHLOW
& BARRETTE,
Of Counsel.

Filed May 22, 1909, Jerrold R. Letcher, Clerk. By Margaret B. Connell, Deputy Clerk.

Upon motion of E. B. Critchlow, Esq., Attorney for plaintiff, and upon filing an assignment of errors, It is Ordered that the foregoing petition be allowed and a writ of error is hereby allowed, to have reviewed in the United States Circuit Court of Appeals for the Eighth Circuit the judgment heretofore entered herein, and that the amount of bond on said writ of error be and hereby is fixed at Five Hundred Dollars (\$500.), the same to operate also as supersedeas.

Dated May 31, 1909.

WALTER H. SANBORN,
U. S. Circuit Judge.

Assignment of Errors.

And afterwards and on the 22nd day of May, 1909, plaintiff filed its assignment of errors, which, being entitled in said court and cause, is in words and figures following, to-wit:

Comes now the plaintiff in the above entitled action and files the following assignment of errors upon which it will rely upon its prosecution of the writ of error in the above entitled cause on the judgment made and given therein by this Honorable Court on the 29th day of March, 1909:

1. That the United States Circuit Court in and for the District of Utah erred in refusing and denying the motion of plaintiff made on the first day of February, 1909, to be permitted to amend paragraph 12 of the amended complaint herein by inserting after the words "has not been appealed from" the following, to-wit: That on to wit the 10th day of February, 1908, the said defendant Edward P. Ferry, by Frederick W. Stevens, his guardian ad litem and next friend, appearing by said Denison as his attorney, filed in said Probate Court a notice of appeal to the Circuit Court of Ottawa County from said decree, Exhibit "A," together with the reasons therefor incorporated in said notice, as required by law, and at the same time tendered to the said Probate Judge for his approval a bond on said appeal executed by said defendant, and ever since said last named date has by said guardian ad litem and next friend and the said Attorney been seeking by various proceedings in the Circuit Court of Ottawa County and in the Supreme Court of Michigan to compel the said Probate Court of Ottawa County to accept and approve said bond and allow said appeal; and in the course of the proceedings so taken as aforesaid, to-wit, in a petition to the said Circuit Court for Ottawa County for a Writ of Mandamus said defendant by his said guardian ad litem and next friend, averred and showed to the Court that the said Probate Court on December 31, 1907, rendered a final decree in said estate of Amanda W. Ferry, deceased, to-wit, the decree Exhibit "A" hereunto attached.

2. That the said United States Circuit Court in and for the District of Utah erred in making and entering on March 6th, 1909, the order herein sustaining the demurrer of the defendant to the amended complaint of plaintiff.

3. That the said United States Circuit Court for the District of Utah erred in making and entering herein on the 29th day March, 1909, its final judgment in favor of the defendant and against the plaintiff, dismissing this cause.

Dated May 22, 1909.

H. C. HALL,
E. B. CRITCHLOW,
Attorneys for Plaintiff.

HENDERSON, PIERCE, CRITCHLOW
& BARRETTE,
Of Counsel.

Filed May 22, 1909, Jerrold R. Letcher, Clerk. By Margaret B. Connell, Deputy.

Bond on Writ of Error.

And afterwards and on the 31st day of May, 1909, bond on writ of error was duly approved by Walter H. Sanborn, United States Circuit Judge for the Eighth Circuit, which, being entitled in said court and cause, is in words and figures following, to-wit:

Know All Men By These Presents that we, The Michigan Trust Company, a corporation, as principal, and Fidelity and Deposit Company, of Maryland, a corporation under the laws of Maryland as Surety, are held and firmly bound unto Edward P. Ferry, defendant above named, in the sum of Five Hundred Dollars, to be paid to the said Edward P. Ferry, his executors or administrators, to which payment well and truly to be made we bind ourselves and each of us jointly and severally, and our and each of our successors, representatives and assigns, firmly by these presents.

Sealed with our seals and dated the 22 day of May, 1909.

Whereas the above named plaintiff, The Michigan Trust Company, has sued out a writ of error to the United States Circuit Court of Appeals for the Eighth Circuit, to reverse the judgment in the above entitled cause made and given by the Circuit Court of the United States for the District of Utah—

Now Therefore, the condition of this obligation is such that if the above named The Michigan Trust Company shall prosecute said writ to effect and answer all costs and damages if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and virtue.

THE MICHIGAN TRUST COMPANY,
By E. B. CRITCHLOW,

Its Attorney and Counsel.

FIDELITY & DEPOSIT COMPANY,
By HARRY J. COLDING. [SEAL.]

Attested and Sealed.

BENJAMIN WILLIAMSON.

The above and foregoing approved as security upon writ of error herein, to operate as supersedeas.

WALTER H. SANBORN,
U. S. Circuit Judge.

May 31, 1909.

Filed May 31, 1909. Jerrold R. Letcher, Clerk.

Stipulation in re Writ of Error.

And afterwards and on the 4th day of June, 1909, stipulation was filed by plaintiff in re writ of error, which, being entitled in said court and cause, is in words and figures following, to-wit:

It is stipulated that the Clerk shall return as the record upon writ of error in this cause the following:

Amended Complaint
 Demurrer to Amended Complaint
 Order sustaining Demurrer to Amended Complaint and denying
 Motion to amend
 Motion to dismiss
 Bill of Exceptions—Judgment—
 Petition for Writ of Error
 Assignment of Errors
 Bond on Writ of Error
 Writ of Error
 Citation.

HENDERSON, PIERCE, CRITCHLOW
 & BARRETTE,

Attorneys for Plaintiff in Error.

Dated June 3rd, 1909.

RICHARDS, RICHARDS & FERRY,
 VAN COTT, ALLISON & RITER,

Attorneys for Defendant in Error.

Filed June 4, 1909. Jerrold R. Letcher, Clerk.

In the Circuit Court of the United States for the District of Utah,
 Eighth Circuit.

24 1024.

THE MICHIGAN TRUST COMPANY, a Corporation, Plaintiff,
 vs.

EDWARD P. FERRY, Defendant.

UNITED STATES OF AMERICA,
District of Utah, ss:

The President of the United States to the Honorable the Judge of
 the Circuit Court of the United States for the District of Utah,
 Greeting:

Because in the record and proceedings, as also in the rendition of
 judgment of a plea which is in the said Circuit Court before you,
 between The Michigan Trust Company, a corporation, plaintiff in
 error, and Edward P. Ferry, defendant in error, a manifest error
 hath appeared, to the great damage of the said The Michigan Trust
 Company, plaintiff in error, as by its complaint appears, we being
 willing that error if any hath been should be duly corrected and full
 and speedy justice done to the parties aforesaid in this behalf Do
 Command You if judgment be therein given, that then, under your
 seal, distinctly, and openly, you send the record and proceedings
 aforesaid, with all things concerning the same, to the United States
 Circuit Court of Appeals for the Eighth Circuit, together with this
 Writ, so that you may have the same at the City of St. Louis in the

State of Missouri on the 1st day of July next in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 27th day of May, in the year of our Lord one thousand nine hundred and nine.

[Seal United States Circuit Court, District of Utah.]

JERROLD R. LETCHER,
*Clerk of the United States Circuit Court for
the Eighth Circuit, District of Utah.*
By MARGARET B. CONNELL,

Deputy Clerk.

Allowed by:

WALTER H. SANBORN,
U. S. Circuit Judge.

25 Service of within Writ of Error and receipt of a copy thereof is hereby admitted this 3rd day of June, 1909.

JOSEPH T. RICHARDS &
WALDEMAR VAN COTT,
Attorneys for Defendant in Error.

UNITED STATES OF AMERICA,
District of Utah, ss:

In obedience to the command of the within Writ, I herewith transmit to the United States Circuit Court of Appeals, a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

In Witness Whereof, I hereto subscribe my name and affix the seal of the United States Circuit Court for the District of Utah, this 23rd day of June, A. D. 1909.

[Seal United States Circuit Court, District of Utah.]

JERROLD R. LETCHER, *Clerk.*

The United States of America, to Edward P. Ferry, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at City of St. Louis, Missouri, sixty days from and after the day this Citation bears date, pursuant to a writ of error, filed in the Clerk's office of the Circuit Court of the United States for the District of Utah, wherein The Michigan Trust Company, a corporation, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said Michigan Trust Company as in said writ of error mentioned, should not be

corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Walter H. Sanborn, Presiding Judge of the United States Circuit Court of Appeals for the Eighth Circuit, this thirty-first day of May, in the year of our Lord one thousand nine hundred and nine.

WALTER H. SANBORN,
*Presiding Judge of the United States Circuit
Court of Appeals for the Eighth Circuit.*

26 Service of above citation admitted this 3d day of June,
1909.

JOSEPH T. RICHARDS &
WALDEMAR VAN COTT,
Attorneys for Edward P. Ferry, Defendant.

No. —. United States Circuit Court of Appeals, Eighth Circuit.
The Michigan Trust Company, Plaintiff in Error, vs. Edward P. Ferry. Citation on Writ of Error.

UNITED STATES OF AMERICA,
District of Utah, as:

I, Jerrold R. Letcher, Clerk of the United States Circuit Court for the District of Utah, do hereby certify that the foregoing pages numbered from one to 41 inclusive, are as full, true and complete a transcript of all the pleadings, proceedings and records now on file and of record in my office, in a certain cause heretofore adjudicated in said Court, wherein Michigan Trust Company, a corporation, was plaintiff and Edward P. Ferry was defendant, as it purports to contain, and made pursuant to the Stipulation filed herein by the plaintiff and entered into between the said parties.

I further certify that the original writ of error and citation are hereto attached and herewith returned with the transcript of the record in said cause.

In Testimony Whereof, I affix my official signature and the seal of said Court, at Salt Lake City, in said district, this 23rd day of June, A. D. 1909, and of the Independence of the United States of America the 133rd year.

[Seal United States Circuit Court, District of Utah.]

JERROLD R. LETCHER, *Clerk.*

Filed Jun. 28, 1909. John D. Jordan, Clerk.

27 (*Clerk's Certificate to Printed Record.*)

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing

printed record in the case of The Michigan Trust Company, a Corporation, Plaintiff in Error, vs. Edward P. Ferry, No. 3108, was printed under my supervision and is identical with the printed record upon which said cause was heard and decided in said Circuit Court of Appeals.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this thirteenth day of November, A. D. 1910.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,

*Clerk of the United States Circuit Court
of Appeals for the Eighth Circuit.*

28 Pleas and Proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the December Term, 1909, of said Court, before the Honorable Walter H. Sanborn and the Honorable Willis Van Devanter, Circuit Judges, and the Honorable William H. Munger, District Judge.

Attest:

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,

*Clerk of the United States Circuit Court
of Appeals for the Eighth Circuit.*

Be it Remembered that heretofore, to-wit: on the twenty-eighth day of June, A. D. 1909, a transcript of record, pursuant to a writ of error directed to the Circuit Court of the United States for the District of Utah, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause wherein The Michigan Trust Company a Corporation, was Plaintiff in Error, and Edward P. Perry was Defendant in Error, which said transcript of record was filed and docketed in said Circuit Court of Appeals as No. 3108.

That thereafter the following proceedings were had in said cause, in said Circuit Court of Appeals, viz:

29 (*Appearance of Counsel for Plaintiff in Error.*)

On the second day of July, A. D. 1909, the appearance of counsel for plaintiff in error was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 3108.

THE MICHIGAN TRUST COMPANY, a Corporation, Plaintiff in Error,
 vs.
 EDWARD P. FERRY.

The Clerk will enter my appearance as Counsel for the Plaintiff in Error.

HENRY C. HALL,
Colorado Springs, Colo.
 EDWARD B. CRITCHLOW,
Salt Lake City.
 WILLIAM J. BARRETTE,
Salt Lake City.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 3108. The Michigan Trust Company, a corporation, Plaintiff in Error, vs. Edward P. Ferry. Appearance. Filed Jul-2, 1909, John D. Jordan, Clerk. Henry C. Hall, Edward B. Critchlow, William J. Barrette, Counsel for Pl'ff in Error.

(*Appearance of Mr. Joseph T. Richards as Counsel for Defendant in Error.*)

And on the seventeenth day of July, A. D. 1909, the appearance of Mr. Joseph T. Richards, as counsel for the defendant in error, was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 3108.

THE MICHIGAN TRUST COMPANY, a Corporation, Plaintiff in Error,
 vs.
 EDWARD P. FERRY.

30 The Clerk will enter my appearance as Counsel for the Defendant in Error.

JOSEPH T. RICHARDS.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 3108. The Michigan Trust Company, a corporation, Plaintiff in Error, vs. Edward P. Ferry. Appearance. Filed Jul-17, 1909, John D. Jordan, Clerk. Joseph T. Richards, Counsel for Def't in Error.

(Appearance of Messrs. Van Cott, Allison & Ritter as Counsel for Defendant in Error.)

And on the seventeenth day of July, A. D. 1909, the appearance of Messrs. Van Cott, Allison & Ritter, as counsel for the defendant in error, was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 3108.

THE MICHIGAN TRUST COMPANY, a Corporation, Plaintiff in Error,
vs.
EDWARD P. FERRY.

The Clerk will enter my appearance as Counsel for the Defendant in Error.

WALDEMAR VAN COTT.
E. M. ALLISON, JR.
W. D. RITER.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 3108. The Michigan Trust Company, a corporation, Plaintiff in Error, vs. Edward P. Ferry. Appearance. Filed Jul- 17, 1909, John D. Jordan, Clerk. Waldemar Van Cott, E. M. Allison, Jr., W. D. Riter, Counsel for Def't in Error.

(Order of Submission.)

And on the twenty-first day of September, A. D. 1909, in the record of the proceedings of said Circuit Court of Appeals is an order of submission in said cause, in the words and figures following, to-wit:

31 United States Circuit Court of Appeals, Eighth Circuit, September Term, 1909, Tuesday, September 21, 1909.

No. 3108.

THE MICHIGAN TRUST COMPANY, a Corporation, Plaintiff in Error,
vs.
EDWARD P. FERRY.

In Error to the Circuit Court of the United States for the District of Utah.

This cause having been called for hearing in its regular order, argument was commenced by Mr. Henry C. Hall for plaintiff in

error, continued by Mr. Waldemar Van Cott and Mr. Joseph T. Richards for defendant in error and concluded by Mr. Edward B. Critchlow for plaintiff in error.

Thereupon, this cause was submitted to the Court on the transcript of record from said Circuit Court and the briefs of counsel filed herein.

(Opinion.)

And on the tenth day of January, A. D. 1910, the opinion of the United States Circuit Court of Appeals for the Eighth Circuit was filed in said cause, in the words and figures following, to-wit:

32 United States Circuit Court of Appeals, Eighth Circuit, December Term, A. D. 1909.

No. 3108.

THE MICHIGAN TRUST COMPANY, a Corporation, Plaintiff in Error,
VS.
EDWARD P. FERRY, Defendant in Error.

In Error to the Circuit Court of the United States for the District of Utah.

Mr. Henry C. Hall and Mr. Edward B. Critchlow (Mr. Dunbar F. Carpenter, was with them on the brief) for plaintiff in error.

Mr. Waldemar Van Cott and Mr. Joseph T. Richards, for the defendant in error.

Before Sanborn and Van Devanter, Circuit Judges, and William H. Munger, District Judge.

SANBORN, *Circuit Judge*, delivered the opinion of the court.

In the year 1870, Edward P. Ferry, who was then a citizen of Michigan, was appointed executor of the will of Amanda W. Ferry, by the Probate Court of the County of Ottawa in the State of Michigan. In December, 1907, upon a petition of legatees and devisees of Amanda W. Ferry the probate court entered a judgment against Edward P. Ferry for damages for the mal-administration of the estate of Amanda in the sum of \$16,458.81, and decreed that this amount should be paid to the Michigan Trust Company which was appointed administrator de bonis non of that estate. A complaint was filed by the Trust Company in the Circuit Court for the District of Utah which set forth these facts and other facts which are substantially identical with those which conditioned the cause of action of the Michigan Trust Company in No. 3107 which was argued and submitted at the same time with this case. The court below sustained a demurrer to the amended complaint and refused to permit a second amendment. A dismissal of the complaint fol-

lowed and the writ of error in this case presents the same questions which were raised and have been decided in No. 8107, in which the sufficiency of a similar complaint upon a like cause of action upon a judgment rendered by the same probate court against Edward P. Ferry for a devastavit of the estate of William M. Ferry was involved. Upon the authority of the opinion and conclusion in that case the judgment in this case must be affirmed, and it is so ordered.

Filed January 10, 1910.

34

(Judgment.)

And on the tenth day of January, A. D. 1910, in the record of the proceedings of said Circuit Court of Appeals is a judgment in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1909, Monday, January 10, 1910.

No. 8108.

THE MICHIGAN TRUST COMPANY, a Corporation, Plaintiff in Error,
vs.
EDWARD P. FERRY.

In Error to the Circuit Court of the United States for the District of Utah.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Utah, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said Circuit Court, in this cause, be, and the same is hereby, affirmed with costs; and that Edward P. Ferry have and recover against The Michigan Trust Company the sum of twenty dollars for his costs herein and have execution therefor.

January 10, 1910.

(Petition for Rehearing.)

And on the tenth day of March, A. D. 1910, a petition of the plaintiff in error for a rehearing was filed in said cause, in the words and figures following, to-wit:

35 United States Circuit Court of Appeals, Eighth Circuit.

No. 8108.

THE MICHIGAN TRUST COMPANY, a Corporation, Plaintiff in Error,
vs.
EDWARD P. FERRY, Defendant in Error.

In Error to the Circuit Court of the United States for the District
of Utah.

Petition for Rehearing.

Now comes the Plaintiff in Error and prays for a rehearing by
this Honorable Court of the Writ of Error herein argued September
1909, on the grounds following, to-wit:

I.

Under the practice in Michigan, the jurisdiction of the probate
court extends to accounting for all assets which have, at any time,
come into the hands of the executor, and to a statement and settle-
ment of his account for all of such assets.

II.

The notice or substituted process served upon the defendant herein
embraced an accounting for all of such assets. The petition and
notice were ample for exercise of that jurisdiction and should not
be confined to assets "unadministered" in the sense attached to that
word by this Court.

36 III.

The petition filed in the probate court did not contain the qualify-
ing words "which was unadministered." The order made and pub-
lished appointing a date for hearing thereon recited said petition
as praying:

"that Edward P. Ferry be removed as executor of the will of said
deceased by an order of this court, and that he or his representa-
tives be ordered to account forthwith to this court, for the estate
of said deceased down to the date of said accounting, and that the
administration of said deceased be granted unto the Michigan
Trust Company as administrator de bonis non with the will an-
nexed, or to some other suitable person."

This was the notice which Edward P. Ferry received and to which
he responded by appearance in probate court.

That court had power to cite him in like manner of its own
motion.

The qualifying words above quoted were first used in the amended

complaint below and were there used in the sense attached to them by the Supreme Court of Michigan.

IV.

The conclusions stated by this Court in its opinion (page 8 thereof) should not therefore be limited to assets "unadministered" as the word is there defined. The word "administered" as used in Michigan statutes and jurisprudence has been construed and applied by the Supreme Court of that State, (*Lafferty vs. Bank*, 76 Mich. 35, 50), and such construction must govern all the courts, state
37 and federal, under the full faith and credit clause of the constitution.

The distinction established by this Court between probate court jurisdiction of subject matter and person to remove the executor, require accounting for unadministered assets, establish the true state of his account and appoint a successory administrator, which this Court sustains, and jurisdiction to adjudicate his liability to the estate and to compel payment by the executor individually of the balance found due, which it denies, was not argued at all, or briefed except very indirectly, and plaintiff desires opportunity to discuss it.

V.

It appears from the decree itself that the executor was also cited to examination of his final account preparatory to statement and settlement thereof, and the notice of such examination of his final account was duly served in the statutory manner, with like effect as the original notice theretofore served. He was bound by that notice as fully as by the original notice.

VI.

The notice served upon Edward P. Ferry calling him to "account for the estate down to the date of the accounting" was in effect a notice calling upon him to liquidate his account.

VII.

In so far as the probate court had exercised jurisdiction over the executor he was properly and fully represented by counsel of record, guardian ad litem and next friend, and service of orders upon them in progress of the litigation was binding upon him as upon any other litigant.

38

VIII.

The probate court proceeding was not in the nature of a personal action based on alleged devastavit. It was an accounting analogous to that usual in chancery, and in a court clothed with chancery powers sufficient to sustain its decree. The outcome of the accounting was to strike a balance against the official required to account, to adjudge his liability for that balance and to decree its payment.

A proceeding for probate of a will or administration of an estate is quasi in rem. An action or proceeding against an executor or administrator upon a cause of action arising against decedent before decease is also quasi in rem.

A proceeding against an executor for his removal and that he account, is quasi in personam, in that the individual and not the estate must respond; even though the proceeding be regarded as quasi in rem, in that (a) the res, the estate, is still the object of solicitude and protection by the probate court, and (b) the liability of the executor is limited to the value of the estate which has come into his hands, nevertheless the proceeding is by or for the estate against the executor. Such actions or proceedings are statutory and merely resemble those in rem or in personam, properly so called.

IX.

The probate courts in Michigan have jurisdiction under their practice to charge an executor in his accounts with assets lacking through waste and to make a final order or decree charging him with the balance found due the estate.

X.

39 Under the probate practice in Michigan the decree properly directed payment of the balance found due, with lawful interest, to the persons entitled thereto.

XI.

Under the probate practice in Michigan the decree was properly rendered against Edward P. Ferry individually.

XII.

Under the probate practice in Michigan the decree was properly in favor of the administrator de bonis non; moreover, in this case all parties interested were in court and acquiesced in the decree directing payment to the plaintiff—in effect an assignment in trust to the plaintiff of their rights.

XIII.

This Court has failed to give to the Michigan probate decree the full faith and credit which it has in Michigan and to which it is entitled in Utah and in every other jurisdiction under the constitution of the United States.

XIV.

This Court has failed to follow the constitution and statutes of the State of Michigan and the construction placed thereon by the decisions of the Michigan courts.

XV.

This Court should take cognizance of the fact that the notice served upon Edward P. Ferry called him to account for the estate of the deceased and, in legal effect to liquidate the same. This
 40 construction should be placed upon the notice, thereby constituting the same due process of law to support the decree.

XVI.

This Court should take cognizance of the fact that under the probate practice of Michigan the notice calling Edward P. Ferry to account was, in its scope, an order to account not merely for "unadministered assets" but for the estate, and, as such, constituted due process of law to support the decree.

XVII.

The decision of this Court should clearly indicate what portions, if any, of the Michigan Probate decree are conclusive, in this Court and everywhere, and what portions, if any, are invalid.

Respectfully submitted,

CHARLES S. THOMAS,
 HENRY C. HALL,

Attorneys for Petitioner, Plaintiff in Error.

EDWARD B. CRITCHLOW,
 WILLARD F. KEENEY,
 WALTER I. LILLIE,
Of Counsel.

We hereby certify that the foregoing petition is, in our opinion, well founded, and is not made for the purpose of delay.

CHARLES S. THOMAS,
 HENRY C. HALL.

(Endorsed:) Filed Mar. 10, 1910, John D. Jordan, Clerk.

41 (Certified Copy of Proof of Publication of Notice of Hearing in Probate Court of Petition for Removal of Executor.)

And on the eighteenth day of June, A. D. 1910, a certified copy of Proof of Publication of Notice of Hearing in Probate Court of Petition for Removal of Executor was filed in said cause, which is omitted here for the reason that a copy of same appears at page — of the transcript in case No. 3107.

(Order Denying Petition for Rehearing.)

And on the eighteenth day of June, A. D. 1910, in the record of the proceedings of said Circuit Court of Appeals is an order de-

nying the petition for a rehearing in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term,
1910, Saturday, June 18, 1910.

No. 3108.

THE MICHIGAN TRUST COMPANY, Plaintiff in Error, .

VS.

EDWARD P. FERRY.

In Error to the Circuit Court of the United States for the District
of Utah.

This cause came on this day to be heard upon the petition for a
rehearing, filed by Counsel for Plaintiff in Error.

On Consideration Whereof, it is now here ordered by this Court,
that said petition for a rehearing of this cause, be, and the same
is hereby, denied.

June 18, 1910.

42 (Clerk's Certificate.)

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of
Appeals for the Eighth Circuit, do hereby certify that the foregoing
transcript contains full, true and complete copies of all the pleadings,
record entries and proceedings, including the opinion of the United
States Circuit Court of Appeals for the Eighth Circuit (except the
transcript of the record from the Circuit Court of the United States
for the District of Utah), in a certain cause in said Court wherein
The Michigan Trust Company, a Corporation, is Plaintiff in Error,
and Edward P. Ferry, is Defendant in Error, No. 3108, as full,
true and complete as the originals of the same remain on file and
of record in my office.

I do further certify that on the eighteenth day of August, A. D.
1910, a mandate was issued out of said Circuit Court of Appeals
in said cause, directed to the Judges of the Circuit Court of the
United States for the District of Utah.

In Testimony Whereof, I hereunto subscribe my name and affix
the seal of the United States Circuit Court of Appeals for the Eighth
Circuit, at office in the City of St. Louis, Missouri, this thirteenth
day of December, A. D. 1910.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court
of Appeals for the Eighth Circuit.

43 In the United States Circuit Court of Appeals for the Eighth Circuit.

No. 3108.

MICHIGAN TRUST COMPANY, Plaintiff in Error,

VS.

EDWARD P. FERRY, Defendant in Error.

It is hereby stipulated between the parties that the certified Transcript of the Record herein, now on file in the office of the Clerk of the Supreme Court of the United States, may be taken as and for a return to the Writ of Certiorari directed from the Supreme Court of the United States to this Court, granted on the 6th day of March, 1911, and that this Stipulation may be certified by the Clerk of this Court as and for such return.

Dated April 6th, 1911.

HENRY C. HALL,
E. B. CRITCHLOW,
Attorneys for Plaintiff in Error.
FRANKLIN S. RICHARDS,
EDWARD S. FERRY,
Attorneys for Defendant in Error.

(Endorsed:) No. 3108. The Michigan Trust Co., Plaintiff in Error, vs. Edward P. Ferry. Stipulation as to return to Writ of Certiorari. Filed Apr. 10, 1911, John D. Jordan, Clerk.

44 UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Eighth Circuit, Greeting:

Being informed that there is now pending before you a suit in which The Michigan Trust Company is plaintiff in error, and Edward P. Ferry is defendant in error, No. 3108, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the Circuit Court of the United States for the District of Utah, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the

45 said Circuit Court of Appeals and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 11th day of March, in the year of our Lord one thousand nine hundred and eleven.

JAMES H. MCKENNEY,
Clerk of the Supreme Court of the United States.

46 [Endorsed:] File No. 22,472. Supreme Court of the United States. No. 851, October Term, 1910. The Michigan Trust Co. vs. Edward P. Ferry. Rec'd Mar. 31. Writ of Certiorari. Filed Apr. 10, 1911, John D. Jordan, Clerk.

Return to Writ.

UNITED STATES OF AMERICA,
Eighth Circuit, ss:

In obedience to the command of the within writ of certiorari and in pursuance of the stipulation of the parties, a full, true and complete copy of which is hereto attached, I hereby certify that the transcript of record furnished with the application for a writ of certiorari in the case of The Michigan Trust Company, Plaintiff in Error, vs. Edward P. Ferry, No. 3108, is a full, true and complete transcript with all the pleadings, proceedings and record entries in said cause as mentioned in the certificates thereto.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the city of St. Louis, Missouri, this tenth day of April, A. D. 1911.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
*Clerk of the United States Circuit Court
of Appeals for the Eighth Circuit.*

47 [Endorsed:] File No. 22,472. Supreme Court U. S., October term, 1910. Term No. 851. The Michigan Trust Co., petitioner, vs. Edward P. Ferry. Writ of certiorari and return. Filed April 12, 1911.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1910.

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No. =====
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THE MICHIGAN TRUST COMPANY, A CORPORATION,
Petitioner,

vs.

EDWARD P. FERRY,
Respondent.

=====
PETITION FOR WRIT OF CERTIORARI.

TO THE HONORABLE THE CHIEF AND ASSOCIATE JUSTICES
OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, The Michigan Trust Company, respectfully petitions this Honorable Court that Writ of Certiorari may be granted directing the Circuit Court of Appeals for the Eighth Circuit to certify to this Honorable Court for its review and determination the case of your petitioner, The Michigan Trust Com-

pany, a corporation, plaintiff, versus Edward P. Ferry, defendant, and respectfully shows:—

First: This action was brought in the Circuit Court for the District of Utah by The Michigan Trust Company, a corporation, plaintiff, against Edward P. Ferry, defendant, upon a final decree rendered in the probate court of Ottawa County, Michigan, whereby, among other things, Edward P. Ferry was directed to pay \$16,458.81 to The Michigan Trust Company as administrator *de bonis non* with the will annexed (Trans. page 8), the jurisdiction of the federal court being based on diversity of citizenship. Demurrer to the complaint was sustained upon the grounds, as expressed by Judge Marshall (Circuit Court), that the decree rendered by the probate court was not final and was not in favor of the plaintiff, and that therefore no action could be maintained upon it. Thereafter an amended complaint was filed setting forth more in detail the proceedings had prior to entry of the probate court decree, and demurrer to this amended complaint was sustained by Judge Marshall without opinion.

Second: Writ of error was then taken from the United States Circuit Court of Appeals for the Eighth Circuit to the Circuit Court, and the judgment of the lower court was there affirmed (Trans. page 31). The opinion of the Circuit Court of Appeals is hereto attached and made a part hereof (pages 15-16).

Thereafter on June 18, 1910, a petition for rehearing was denied by the Circuit Court of Appeals (Trans. page 39). The record of the Circuit Court and Circuit Court of Appeals, with copies, is submitted in conjunction with this petition.

Third: Briefly stated, the proceedings had in Michigan leading up to the probate court decree are these:

In the year 1870, Amanda W. Ferry, widow of Rev. William M. Ferry, died a citizen and resident of Grand Haven, in the County of Ottawa, Michigan, leaving a last will and testament which was admitted to probate in 1871 in the probate court of that county. It divided the residuum, after certain specific and charitable bequests, among her three surviving sons, one-third to each. The sons were Lieut. Col. William M. Ferry, Senator Thomas W. Ferry, and the respondent herein, Edward P. Ferry. The executor, said Edward P. Ferry, duly qualified in said probate court, and not elsewhere, but never filed in that court any annual account. Thereafter, in or about 1878, Edward P. Ferry removed from Michigan to Utah. He there subsequently became a mental incompetent and was so adjudged in February, 1901, and thereupon his sons W. Mont Ferry and Edward S. Ferry were appointed and qualified as guardians of his person and estate.

Fourth: On June 26, 1903, all of the residuary legatees and devisees then living (except Edward P. Ferry), and the representatives and successors in interest of all of them who were then deceased, filed in said probate court their petition praying that Edward P. Ferry be removed as executor by an order of that court and that "he or his representatives be ordered to account forthwith to this court for the estate of said deceased down to the date of said accounting," and that administration be granted to The Michigan Trust Company, petitioner herein, or to some other suitable

person, as administrator *de bonis non* with the will annexed (Trans. page 39); and thereafter the court by its order fixed the 21st day of July, 1903, for the hearing of said petition. It further ordered that notice thereof be given by publication in a newspaper designated in accordance with the statutes of Michigan in such case made and provided. The said order was duly published as therein directed and according to the statute in such case made and provided, and personal service of said order and notice was made upon Edward P. Ferry and also upon his said guardians W. Mont Ferry and Edward S. Ferry, at Salt Lake City, Utah. (Trans. page 3.)

Fifth: Upon the day so fixed for hearing Edward P. Ferry appeared by his counsel, and by his guardian *ad litem* and next friend appointed by said court on due application therefor on his behalf, said counsel, guardian *ad litem* and next friend being all employed for that purpose by the guardians of said Edward P. Ferry under order and permission of the District Court for the Third Judicial District of Utah, which court had theretofore appointed said guardians (Trans. pages 3 and 4), and filed his answer to the said petition, as also his cross petition praying for affirmative relief. Answer to this cross petition was filed by the original petitioners, and the issues so joined were set for hearing (Trans. page 4).

Sixth: During the progress of that hearing Edward P. Ferry appeared therein and was represented by his several attorneys, as well as by his guardian *ad litem* and next friend (Trans. pages 4 and 5). Proofs were taken in behalf of the petitioners and also

in behalf of Edward P. Ferry. In 1905 an interlocutory order was made by the probate court requiring the executor to file a more detailed statement of account of his receipts and disbursements for said estate. The executor contended before the probate court that no further account should be required, and he neglected and refused to render any such account. (Trans. page 10.)

Seventh: Thereafter, by leave of court, further proofs were taken and after the same were concluded, and as preliminary to final order on the merits, the probate court ordered notice to be given that upon a day therein fixed the account, as the petitioners claimed the same to be, would be submitted to the court, and that application would then and there be made for the examination and approval thereof, and further for leave to charge, surcharge and falsify the alleged final account of said executor then before the court, to file amendments and objections thereto, and that the said petitioners would then and there move the court for a final decree on the merits in the matter of said account. (Trans. pages 10 and 11.) This order was duly published, as therein directed, giving all persons interested notice of the same, and personal notice by service thereof in Utah was also given to all persons interested of the examination of the said final account in accordance with the order of the probate court and the statute of Michigan in such case made and provided. (Trans. page 11.)

Eighth: Pursuant to said order and notice the petitioners by leave of court made and submitted to the court a statement charging, surcharging and falsi-

fyng the alleged final account of the executor already before the court, which statement presented the proposed amendments and objections thereto, and stated said account, based upon proofs taken, as the petitioners claimed the same to be. The accountant for petitioners was thereupon cross-examined on behalf of the executor, and the court after carefully examining and correcting the alleged final account of the executor and all other statements and accounts submitted (Trans. page 11), rendered its decree on December 31, 1907.

Ninth: By this final decree the probate court found that the executor had not accounted for all the moneys and properties of the estate coming into his hands, and was not entitled to discharge; that at the time of issuance of letters testamentary to said executor there came to his possession a large amount of property belonging to the estate; that since that date large amounts of money and property belonging to the estate had come into his hands, none of which had been accounted for by him; and that large amounts of money and property belonging to the estate had been received, misappropriated and converted by him to his own use instead of being applied to or for the benefit of the estate. (Trans. page 12.)

The probate court further found that the estate had not been fully administered; that the executor was not entitled to an order closing the estate; that it was his duty to render a true and perfect account of his doings as such executor, but this he had neglected and refused to do; that those acting for him had taken from Michigan to Utah books and papers containing certain of his accounts as executor, had refused to return the same when ordered by the court to do so, and

had, in so far as lay in their power, suppressed evidence and endeavored to prevent the rendition of a decision on the merits, but that the proofs taken afforded such data as to enable the court to state the executor's account truly, correctly and without injustice to the executor. (Trans. page 13.) The probate court further found from the proofs that, after crediting all disbursements, Edward P. Ferry, the executor, was indebted to the estate on that date upon balance of accounts in the sum of \$24,688.21 (Trans. page 14).

Tenth: Upon these and other findings (Trans. pages 11-14) the decree denied the cross-petition of Edward P. Ferry (Trans. page 14), removed him as executor and appointed the petitioner herein as administrator *de bonis non* with the will annexed (Trans. pages 14 and 15), permitted him as residuary legatee to retain one-third of the net balance aforesaid as fixed by the decree (Trans. page 15), and adjudged that the remainder, to-wit, \$16,458.81, for which he was individually liable, be paid by him to this petitioner, as administrator as aforesaid (Trans. page 16).

Eleventh: A copy of this decree was attached to and made a part of the said amended complaint. (Trans. pages 8, 9-16). The amended complaint in giving the substance of the petition dated June 26, 1903, in the probate court summarized the prayer for accounting as being that Edward P. Ferry be ordered to account forthwith to said court "for the residue of said estate of said deceased which was unadministered" (Trans. page 2). The word "administered" was there used in the sense given it by the jurisprudence of Michigan.

Twelfth: Your petitioner is advised and so believes that the said decision of the Circuit Court of Appeals sustaining the judgment of the Circuit Court upholding the demurrer there interposed is erroneous, without legal justification and contrary to the rules, decisions and principles of law applicable to such cases.

The grounds upon which this Court is asked to review the judgment of the Circuit Court of Appeals are:

1. Because the Circuit Court of Appeals of the Eighth Circuit has failed to give full faith and credit to the final judgment of a state court of general jurisdiction in matters relating to settlement of estates, to-wit, the decree of the Probate Court of Ottawa County, Michigan. The denial of such faith and credit is due to errors of said Court apparent from its opinion in this cause and committed, *inter alia*, in the following particulars:

(a) Said Court erred in holding that the accounting in the probate court of Michigan could be had only of the assets then remaining unadministered in the hands of the executor as such, thereby failing to recognize the force and binding effect of Section 9428 (Compiled Laws of Michigan, 1897) which is as follows:

"Every executor and administrator shall be chargeable in his account with the whole of the goods, chattels, rights and credits of the deceased, which may come to his possession; also, with all the proceeds of the real estate which may be sold for the payment of debts and legacies, and with all the interest, profit and income which shall in any way come to his hands from the estate of the deceased."

(b) Said Court erred in holding that under the

laws of Michigan assets of an estate which have been converted by an executor and appropriated to his own use are "administered" assets, and that the probate court of Michigan had no jurisdiction to require the defaulting executor to account for such converted and misappropriated assets—this holding being in direct conflict with the rule laid down in Michigan.

Lafferty vs. The People's Bank, 76 Mich., 35;
Hall vs. Grovier, 25 Mich., 427.

(c) Said Court erred in not recognizing or giving force or effect to the notice served personally and by publication upon the executor, who was then before the probate court accounting to it, fixing date for examination of the final account of the executor and the statement of the petitioners charging, surcharging and falsifying his alleged final account.

(d) Said Court erred in limiting by construction and interpretation the power and jurisdiction of the probate court to compel the executor to "account," that is, to state honestly the items with which he should be charged and credited, and to pay over and deliver the balance in full.

Hall vs. Grovier, 25 Mich., 427, 436.
Pyatt vs. Pyatt, 46 N. J. Eq., 285.

(e) Said Court erred in holding that no claim or charge against the executor for loss to the estate by reason of his waste or maladministration could be considered by the probate court in removing the executor and settling his account, and that the decree was improperly rendered against Edward P. Ferry, individually.

Comp. Laws Mich., 1897, Sec. 9435.

"When an executor or an administrator shall neglect or unreasonably delay to raise money, by collecting the debts or selling the real or personal estate of the deceased, or shall neglect to pay over the money he shall have in his hands, and the value of the estate shall thereby be lessened, or unnecessary cost or interest shall accrue, or the persons interested shall suffer loss, the same shall be deemed waste, and the damages sustained may be charged against the executor or administrator in his account, or he shall be liable therefor on his administration bond."

Bascom vs. Taylor, 39 Mich., 682;
 Stevens vs. Kirby, 156 Mich., 526;
 Clark vs. Fredenberg, 43 Mich., 263;
 Pierce vs. Holzer, 65 Mich., 263;
In re Palm's Appeal, 44 Mich., 637.

And, in consequence, said Court erred in holding that any charge or claim against the executor for loss to the estate by reason of his waste or maladministration constituted a challenged cause of action *in personam* at common law, to-wit for devastavit, to be pleaded and noticed as such, of which the probate court had no jurisdiction.

(f) Said Court erred in holding that the probate court had no jurisdiction to direct that the balance due from the executor to the estate be paid to the administrator *de bonis non* appointed in his place and stead, and in this connection the said Court erred in not taking cognizance of the presence in Court and consent of all parties who might lay claim to that balance.

Storer vs. Storer, 6 Mass., 390;
 Campau vs. Gillette, 1 Mich., 416;

Butterick vs. King, 7 Metc., 20;
 Wiggin vs. Swett, 6 Metc., 194, 198;
 Sewall vs. Patch, 132 Mass., 326;
 Minot vs. Norcross, 143 Mass., 326;
 Cranson vs. Wilsey, 71 Mich., 356.

Morris vs. Morris, 4 Grattan (Va.), 293.

And said Court erred in holding that the only way in which the probate court may ever acquire any jurisdiction whatever over claims against the executor because of his neglect or maladministration is by action on his bond by the judge of probate.

(g) Said Court erred in holding that the decree of the probate court attempted to deprive Edward P. Ferry of property without due process of law.

Fitzsimmons vs. Johnson, 90 Tenn., 416.

(h) Said Court erred in failing and refusing to give force and effect to the affirmative act of the executor, Edward P. Ferry, who by his next friend invoked the jurisdiction of the Probate Court by a cross-petition filed in the proceeding wherein his acts as executor were brought in question, and in said cross-petition asked that his accounts be allowed and that he be discharged as executor, and offered proofs in support of said cross-petition. This cross-petition was denied by the decree.

In the matter of Moore, 209 U. S., 490.

II. Because the Circuit Court of Appeals failed to construe a judgment of Michigan in accordance with the statutes and decisions of that State, and the construction given is opposed to and conflicts with the decisions of the highest court of Michigan.

III. Because of the very great importance of this case to the parties and the amount involved therein.

IV. Because of the great importance of this case to the public in that the judgment of the Circuit Court of Appeals of the Eighth Circuit, as it stands, gives immunity to an absconding executor or administrator who has despoiled the estate he represents, and denies to the Michigan Court which appointed him the right to compel him to respond to it for a breach of the duty owed to said Court.

V. Because the decision of the Circuit Court of Appeals, if suffered to remain unchanged, establishes rules of law in the matter of decedents' estates in Michigan which are in direct conflict with the statutes and decisions of Michigan, but which nevertheless are controlling upon all United States circuit courts in the Eighth Circuit, and authoritative in all other federal courts, including those sitting in Michigan, thus presenting to this Honorable Court a question of the highest public importance, worthy of its consideration and review in the public interest.

VI. Because as your petitioner is informed and believes the judgment in this case is made final in the Circuit Court of Appeals, except for the interposition by this Court as herein prayed.

WHEREFORE, in view of the premises aforesaid your petitioner respectfully prays that this Court will grant its writ of certiorari directed to the United States Circuit Court of Appeals of the Eighth Circuit, commanding said Court to certify and send to it on a day to be therein designated a full and complete transcript of the record of the said Circuit Court of Ap-

peals in the said case therein pending entitled: "The Michigan Trust Company, a corporation, plaintiff in error, vs. Edward P. Ferry, defendant in error, Number 3108," to the end that said cause may be reviewed and determined by this Court under and pursuant to Section 6 of the Act of Congress entitled: "An Act to Establish Circuit Courts of Appeals and to Define and Regulate in Certain Cases the Jurisdiction of the Courts of the United States, and for other Purposes," approved March 3, 1891, and that said judgment of the said Circuit Court of Appeals in said case be reversed by this Honorable Court, and that your petitioner have such other and further relief as the nature of the case may require and as to this Court may seem proper in the premises.

Your petitioner will ever pray.

WILLARD F. KEENEY,
EDWARD B. CRITCHLOW,
HENRY C. HALL,

Attorneys for Petitioner.

CHARLES S. THOMAS,
WALTER I. LILLIE,
WALTER E. ERNST,

Of Counsel.

STATE OF MICHIGAN,)
 County of Kent.) ss.

Lewis H. Withey, being first duly sworn deposes and says that he is an officer of The Michigan Trust Company, a corporation, the petitioner herein, to-wit, its President; that he has read the foregoing petition and knows the contents thereof; that the same is true of his knowledge except as to the matters therein stated to be alleged on his information and belief, and as to those matters he believes it to be true.

LEWIS H. WITHEY.

Subscribed and sworn to before me this 30th day of December, 1910.

ARTHUR C. SHARPE.

Notary Public.

(Notarial Seal.)

My commission expires June 5, 1913.

CERTIFICATE OF COUNSEL.

I hereby certify that I have carefully examined the foregoing petition for writ of certiorari, and the allegations thereof are true as I verily believe, and that in my opinion the same is well founded and the case is one in which the prayer of the petitioner should be granted by this Honorable Court.

WILLARD F. KEENEY,
 Attorney for Petitioner.

(Opinion)

UNITED STATES CIRCUIT COURT OF APPEALS
Eighth Circuit.

No. 3108.

DECEMBER TERM, A. D. 1909.

THE MICHIGAN TRUST COMPANY, A CORPORATION,
Plaintiff in Error,

vs.

EDWARD P. FERRY,
Defendant in Error.

*In Error to the Circuit Court of the United States for
the District of Utah.*

Mr. Henry C. Hall and Mr. Edward B. Critchlow (Mr.
Dunbar F. Carpenter was with them on the brief)
for plaintiff in error.

Mr. Waldemar Van Cott and Mr. Joseph T. Richards,
for the defendant in error.

Before SANBORN and VAN DEVANTER, Circuit Judges,
and WILLIAM H. MUNGER, District Judge.

SANBORN, Circuit Judge, delivered the opinion of the
court.

In the year 1870, Edward P. Ferry, who was then
a citizen of Michigan, was appointed executor of the

(Opinion.)

will of Amanda W. Ferry, by the Probate Court of the County of Ottawa in the State of Michigan. In December, 1907, upon a petition of legatees and devisees of Amanda W. Ferry the probate court entered a judgment against Edward P. Ferry for damages for the mal-administration of the estate of Amanda in the sum of \$16,458.81, and decreed that this amount should be paid to the Michigan Trust Company which was appointed administrator *de bonis non* of that estate. A complaint was filed by the Trust Company in the Circuit Court for the District of Utah which set forth these facts and other facts which are substantially identical with those which conditioned the cause of action of the Michigan Trust Company in No. 3107 which was argued and submitted at the same time with this case. The court below sustained a demurrer to the amended complaint and refused to permit a second amendment. A dismissal of the complaint followed and the writ of error in this case presents the same questions which were raised and have been decided in No. 3107, in which the sufficiency of a similar complaint upon a like cause of action upon a judgment rendered by the same probate court against Edward P. Ferry for a devastavit of the estate of William M. Ferry was involved. Upon the authority of the opinion and conclusion in that case the judgment in this case must be affirmed, and it is so ordered.

In the Supreme Court of the United States.

OCTOBER TERM, 1910.

THE MICHIGAN TRUST COMPANY,	}	No. 851.
A CORPORATION,		
vs.		
EDWARD P. FERRY,	Respondent.	

BRIEF OF THE RESPONDENT IN OPPOSITION TO THE PETITION OF THE MICHIGAN TRUST COMPANY FOR A WRIT OF CERTIORARI.

We have filed our brief in opposition to the petition for writ of certiorari in the case of The Michigan Trust Company, a corporation, v. Edward P. Ferry, No. 850. The case at bar presents the same questions which were raised and decided in case No. 850. Not wishing to encumber the record we respectfully ask this Court to consider our brief in case No. 850 as applying also to the case at bar.

Respectfully submitted,
FRANKLIN S. RICHARDS,
EDWARD S. FERRY,
Attorneys for Respondent.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1910.

No. 851.

THE MICHIGAN TRUST COMPANY, A CORPORATION,
Petitioner,

vs.

EDWARD P. FERRY,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT
OF CERTIORARI.

The petitioner has filed its petition for writ of certiorari. As the decision of the Circuit Court of Appeals herein is based on that in The Michigan Trust Company, a Corporation, vs. Edward P. Ferry, No. 3107 below, No. 850 here, for the purpose of avoiding unnecessary repetition we respectfully refer this Court to the brief filed in connection with the petition therein, which applies also to the law and facts in this case.

WILLARD F. KEENEY,
EDWARD B. CRITCHLOW,
HENRY C. HALL,
Attorneys for Petitioner.

CHARLES S. THOMAS,
WALTER I. LILLIE,
WALTER E. ERNST,
Of Counsel.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1912.

No. 201.

THE MICHIGAN TRUST COMPANY, A CORPORATION
Petitioner,

vs.

EDWARD P. FERRY,
Respondent.

BRIEF AND ARGUMENT IN BEHALF OF
PETITIONER.

This cause comes here upon writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit, heretofore granted by this Honorable Court.

As stated in the opinion herein of said Circuit Court of Appeals (Trans., p. 27), the amended complaint below (Trans., pp. 1-15) set forth facts which are substantially identical with those which conditioned the cause of action of said The Michigan Trust Company *v.* Edward P. Ferry in

No. 3107 below, No. 200 here, the other facts being that in the year 1870 Edward P. Ferry, then a citizen of Michigan, was appointed by the Probate Court of Ottawa County, Michigan, and qualified and gave bond as executor of the will of Amanda W. Ferry, but never filed any account in said court (Trans., p. 10), and on proceedings in said court for accounting and removal, brought by the petitioners entitled under the will to two-thirds of the residuary estate, the probate court in December, 1907, entered judgment removing said executor, appointing said Trust Company as administrator *de bonis non* with the will annexed of said estate, finding said Edward P. Ferry indebted to said estate, upon balance of account, in the sum of \$24,688.21, and directing him, after deducting his one-third share as a residuary legatee, to pay the remaining two-thirds thereof, to-wit, \$16,458.81, to The Michigan Trust Company as such administrator (Trans., pp. 13-14).

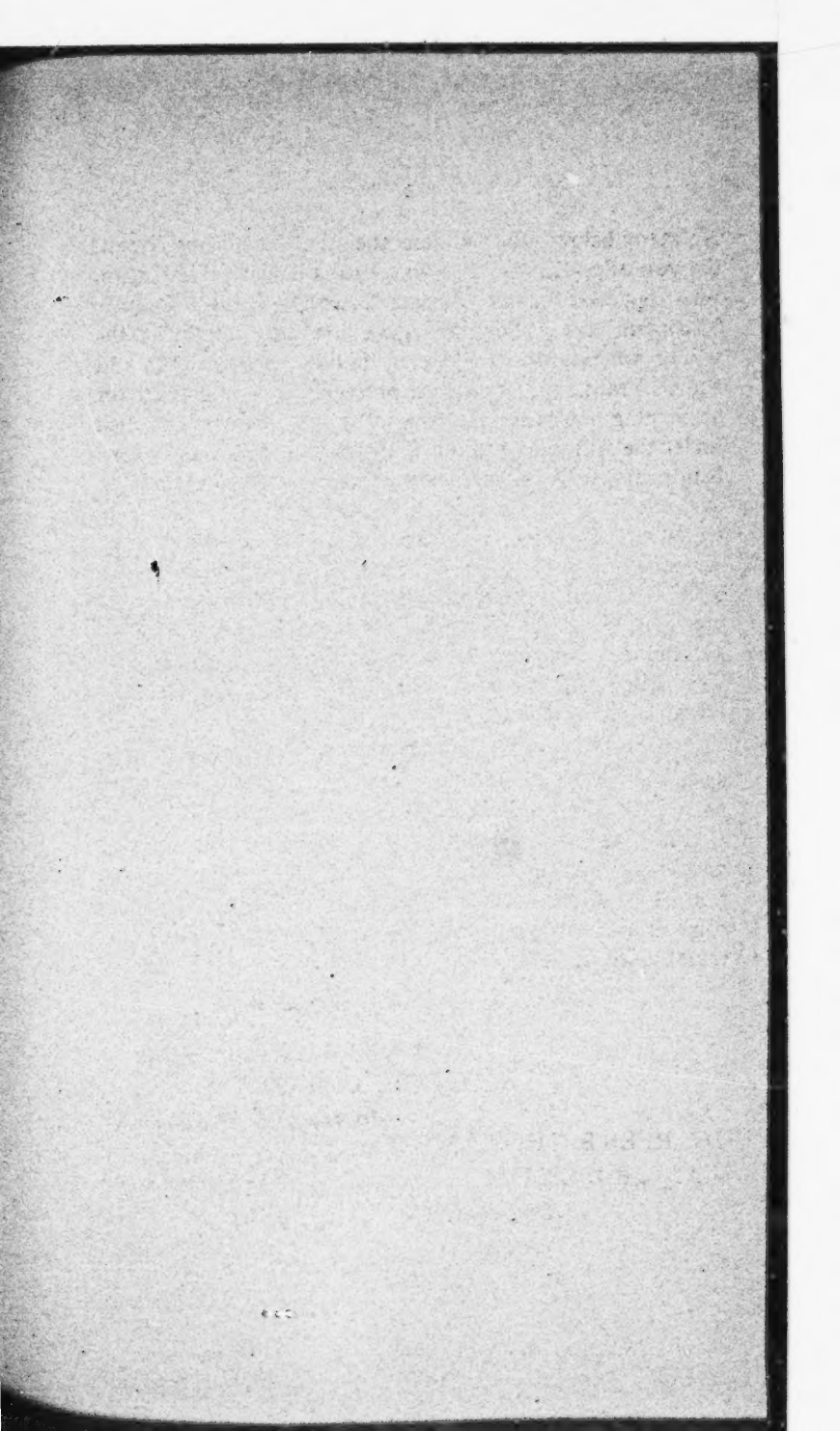
Upon said judgment, like action was brought in the Circuit Court for Utah, and like proceedings had, as in No. 3107 below, No. 200 here, and since the decision herein of said Circuit Court of Appeals is based on its decision in said No. 3107 below, No. 200 here, for the purpose of avoiding repetition we respectfully refer this Court to our brief and argument in said cause No. 200, which applies also to the questions raised in this cause.

WILLARD F. KEENEY,
EDWARD B. CRITCHLOW,
HENRY C. HALL,

Attorneys for Petitioner.

CHARLES S. THOMAS,
WALTER I. LILLIE,

Of Counsel.



IN THE
Supreme Court of the United States

OCTOBER TERM, 1912.

No. 201.

THE MICHIGAN TRUST COMPANY, A CORPORATION,
Petitioner,

v.

EDWARD P. FERRY,
Respondent.

BRIEF FOR RESPONDENT.

The facts in this case are substantially the same as those in case No. 200. The complaint was upon a like cause of action, upon an alleged judgment for a devastavit, rendered under like conditions by the same probate court against Edward P. Ferry, but in the estate of Amanda M. Ferry, deceased. The decision of the Court of Appeals in this case referred to, and was governed by its decision in case No. 200. (Record

pp. 27-28.) The points and authorities relied up by us are the same as set forth in our brief in case No. 200.

We therefore respectfully ask this honorable court to consider our brief in case No. 200 in connection with this cause also.

GEORGE SUTHERLAND,
FRANKLIN S. RICHARDS,
EDWARD STEWART FERRY,
Attorneys for Respondent.